No. 89-1671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF COLUMBIA and
COLUMBIA OUTDOOR ADVERTISING, INC.,
Petitioners,

v.

OMNI OUTDOOR ADVERTISING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether a municipal ordinance that satisfies the standard for state-action immunity articulated in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), nonetheless may come within the purview of the antitrust laws through a "co-conspirator" exception that does not require any showing of a direct financial interest by government officials but relies instead on the subjective motivations of those officials.

2. Whether a private party who successfully persuades a municipality to enact a zoning ordinance may be subjected to antitrust liability if either (a) the zoning ordinance itself is exempt from the antitrust laws, or (b) the private party utilized only legitimate lobbying methods and engaged in no bribery, coercion, or other corruption of the political process.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 891 F.2d 1127, and reprinted at Pet. App. 1a-48a. The unpublished opinion of the United States District Court for the District of South Carolina is reprinted at Pet. App. 49a-67a.

JURISDICTION

The Court of Appeals entered judgment on December 15, 1989, and denied petitioners' petition for rehearing on February 15, 1990. Pet. App. 68a-69a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition for certiorari was granted on June 18, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, which in pertinent part provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for redress of grievances." The statutory provisions involved are sections one and two of the Sherman Act, 15 U.S.C. §§ 1, 2, which are reprinted at Pet. App. 70a-71a.

STATEMENT

In 1982, petitioner the City of Columbia, South Carolina, enacted two ordinances to regulate billboards. First, the City established a temporary moratorium on new billboard construction. Later, the City passed permanent legislation that included billboard spacing restrictions. Petitioner Columbia Outdoor Advertising (COA) met with city officials prior to the enactment of the first ordinance and supported the spacing provisions contained in the final ordinance. COA has long been the dominant billboard operator in Columbia, and its executives were personal friends with several city officials, including the Mayor. Relying on these basic facts, a jury found that the City and COA conspired to restrain trade and monopolize billboards in the local market. The Fourth Circuit upheld that verdict, rejecting the City's claim that its conduct was protected under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and COA's claim that its conduct was protected under the "petitioning" exemption established in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).[1]

[1] The caption in this Court accurately lists all the parties before the district court at the time of judgment and before the court of appeals. The court of appeals erroneously included in its caption a third defendant, J. Willis Cantey. COA has no subsidiaries. Prior to May 1, 1990, it was owned by private individuals. On that date, it was purchased by Outdoor South Limited Partnership, which in turn is composed of First Carolina Communications (as general partner) and Outdoor East Limited Partnership (as limited partner).

1. The events leading up to this litigation began in 1981, when respondent Omni Outdoor Advertising (Omni) entered the Columbia billboard market, attracted in part by the City's lax zoning regulations. C.A. App. 419-20. Omni's strategy for penetrating this market involved the rapid construction of some two hundred billboards—a goal that it eventually achieved. *Id.* at 422-23, 434. In response, COA undertook an aggressive campaign of its own, modernizing its existing billboards and constructing new, state-of-the-art billboards. *Id.* at 515-16, 1171-72, 1401. As a result of this competition, the City experienced a substantial increase in billboards within a short time. *Id.* at 1419, 1877.

During this period, COA met with city officials and discussed the proliferation of billboards and the possibility of an ordinance limiting that proliferation. *E.g.*, *id.* at 2081, 2695. Others, including private citizens, city officials, and even Omni also supported zoning restrictions on billboards. *E.g.*, *id.* at 379, 1890, 2035-39, 3727-29, 3745. In early March of 1982, as citizen concern mounted, *id.* at 1878, 2114, 2164-65, the president of a neighborhood association and several of her neighbors decided to protest Omni's construction of a large billboard adjacent to a residential area of the City. *Id.* at 1856-57. They took their grievance first to the City Zoning Board of Adjustments, *id.* at 1857-58, and then, on March 9, 1982, to City Councilman Patton Adams. *Id.* at 1860. The following day, Councilman Adams introduced for first reading a proposed ordinance that would have barred billboard construction in the downtown area and the relevant neighborhood absent Council approval. J.A. 167; C.A. App. 1879-81.

On March 24, 1982, the City Council passed the ordinance, as amended to impose a 180-day moratorium on the construction of billboards throughout the City, unless authorized by a permit from the Council. *See* J.A. 168 (text of moratorium); *see also* C.A. App. 1881-83.[2] The Council further resolved to enact a permanent, comprehensive zoning ordinance after opportunity for study and public hearings. C.A. App. 406, 1882-83. Omni thereupon filed a state court action challenging the moratorium. On July 23, 1982, the court invalidated the ordinance on the ground that the permit procedure vested too much discretion in the City Council. *Id.* at 2661-63.

In the meantime, the City Council had commissioned the Central Midlands Regional Planning Council (CMRPC) to formulate a comprehensive billboard ordinance. *Id.* at 1885.[3] During the five months between this commission and the enactment of the ordinance on September 22, 1982, CMRPC's recommendations were discussed at numerous public meetings. Countless other discussions took place between city officials, CMRPC personnel, and billboard operators, including representatives of Omni and COA.[4] The ordinance finally enacted by the

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[2] Contrary to the court of appeals' statement, Pet. App. 15a, COA had not "topped off its [billboard] needs" prior to the moratorium's effective date. Although COA had secured several permits to construct billboards shortly before that date, the record is clear that the moratorium applied to these permits as well. C.A. App. 2167, 3771-72.

[3] The CMRPC is a state-authorized agency that provides planning services for four counties, Richland, Lexington, Fairfield, and Newberry, including the municipalities within those counties, in such areas as zoning, transportation, health care, and senior citizen services. C.A. App. 1940.

[4] The sequence of proceedings is reflected in the record as follows: C.A. App. 1956 (May 10, 1982, City Zoning Administrator meets with Omni and COA to discuss proposals for ordinance); *id.* at 1954-55, 3192 (May 12, 1982, first CMRPC proposal at City Council public meeting; Omni and COA attend); *id.* at 1956-57

City Council included billboard spacing requirements and related regulations. J.A. 169-71 (text of full ordinance). Although many features of the ordinance were supported by both Omni and COA, *e.g.*, C.A. App. 1972-77, the specific spacing requirements conformed to COA's views and not Omni's. *Id.* at 1974 & 2646.

2. On November 11, 1982, Omni initiated this action in federal district court, alleging claims under sections one and two of the Sherman Act and under various state law theories. *Id.* at 14-31. The City moved to dismiss the antitrust counts on the ground that its actions were exempt under *Parker* and *Community Communications, Inc. v. City of Boulder*, 455 U.S. 40 (1982). J.A. 3-4. The district court denied the motion on July 11, 1983, reasoning that the *Boulder* standards for applying *Parker* to municipalities do not control when a plaintiff alleges a "conspiracy" between public and private actors and

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(May 19, 1982, City Planning Commission reviews CMRPC proposal and recommends uniform ordinances for City and Richland County at public meeting; COA and OMNI attend); *id.* at 1959 (July 19, 1982, City Planning Commission reviews revised CMRPC draft at public meeting); *id.* at 1965, 2646-48 (July 21, 1982, City Council reviews revised CMRPC draft; City Council directs CMRPC to take comment from billboard industry; Omni attends); *id.* at 1967 (July 21-30, 1982, CMRPC meets with COA and Omni); *id.* at 1968 (August 4, 1982, City Council considers third CMRPC draft at public meeting); *id.* at 1971-72 (August 4, 1982, CMRPC and City Manager meet with COA, Omni and National to review draft); *id.* at 2180-86 (August 10, 1982, City Manager meets with Omni regarding proposed amendments to draft); *id.* at 1973-74 (August 16, 1982, City Planning Commission reviews third CMRPC draft); *id.* at 1974 (August 23, 1982, City Planning Commission holds special session for further review of third CMRPC draft; Omni and COA attend); *id.* at 1977 (August 25, 1982, CMRPC reports to City Council from City Planning Commission at public meeting); *id.* at 1895-98, 2115-18 (September 1, 1982, City Council subcommittee meets with COA, Omni and National); *id.* at 3201 (September 8, 1982, first reading of billboard ordinance at public meeting); *id.* at 3202 (September 22, 1982, enactment of final billboard ordinance at public meeting).

claims that the ordinances are merely "overt acts" in furtherance of that conspiracy. *Id.* at 5-6. The court also ruled that such a conspiracy could be shown by evidence of "corruption or bad faith anticompetitive actions on the part of city officials." *Id.*

At trial in January of 1986, Omni introduced no proof of "corruption." *See id.* 38-42.[6] Instead, it attempted to show that the City and COA acted in concert and that they did so for "bad faith anticompetitive" reasons. *Id.* at 59. In so doing, Omni relied on evidence indicating that COA's lobbying efforts were intended to limit competition, *e.g.* C.A. App. 548-51, 2704, coupled with a showing (1) that COA's Chairman and the Mayor were friends who dined together occasionally and also met to discuss the ordinances, and (2) that COA had made lawful campaign contributions to the Mayor and to several Council members. *Id.* at 2050, 2081, 2083, 3168-69; *see* Br. in Opp. to Cert. at 7, 10.[6]

At the close of evidence, the trial court instructed the jury that the Sherman Act proscribes every "conspiracy in restraint of trade or commerce" and that the distinguishing feature of such agreements is their "direct, substantial and unreasonably restricting effect on competi-

[6] In fact, Omni took the position that the City's actions did not have "to be corrupt" or based on "a bad motive." J.A. 59. It expressly told the jury that "all you have to find, [is] that [the City and COA] worked together to limit the signs. If the purpose is because they think it's great, that doesn't matter." *Id.*

[6] In 1978, four years prior to the adoption of the zoning ordinances, COA provided the Mayor with free billboard space and its Vice Chairman gave a $50 contribution to his campaign. C.A. App. 2051. In 1983, after the commencement of this action, COA provided City Councilman Paul Bennett with discounted billboard space and its Chairman gave a $140 contribution to his campaign. *Id.* at 2110-11. In 1984, COA provided City Councilman William Oustz with free billboard space and its Chairman gave $100 to his campaign. *Id.* at 2156-57.

tion and interstate commerce." J.A. 70. In addition, the court told the jury that COA's First Amendment right to petition the government would not protect anticompetitive conduct if COA had taken such actions "as a part or as the object of a conspiracy." *Id.* at 79.[7] The court nevertheless refused to give any instructions on the specific elements necessary for a finding of conspiracy between the City and a private party; instead, it simply indicated, in a variety of ways, that a conspiracy is an "agreement . . . to violate the law," *id.* at 71, or a "combination of two or more persons to accomplish by concerted actions some unlawful purpose," *id.* In sum, the instructions were completely circular: they told the jury that petitioning for and enacting an ordinance having anticompetitive effects is illegal if done as part of a conspiracy, and that a conspiracy is an agreement to do something unlawful.

3. The jury returned a verdict for Omni on the Sherman Act claims and the state law unfair trade practices claim. It awarded, prior to trebling, $600,000 for conspiracy to restrain trade, $400,000 for conspiracy to monopolize, and $11,000 on the state claim. J.A. 119-20. On November 17, 1988, the district court granted petitioners' motions for judgment notwithstanding the ver-

[7] The full instruction reads:

> Joint efforts truly intended to influence public officials to take official action do not violate antitrust laws, even though the efforts are intended to eliminate competition, unless one or more, and listen to this carefully, they do not violate the antitrust laws unless one or more of the public officials involved was also a participant in the alleged illegal arrangement or conspiracy.
>
> Let me put it another way. It is perfectly lawful for any and all persons to petition their government, but they may not do so as a part or as the object of a conspiracy. Remember, a conspiracy being an agreement between two or more persons to violate the law, or to accomplish an otherwise lawful result in an unlawful manner.

J.A. 78-79; *see also id.* at 81.

dict, holding that the City and COA were exempt from antitrust liability under *Parker* and *Noerr* respectively. Pet. App. 49a-67a.

A divided panel of the Fourth Circuit reversed. The court first found that the City had enacted the ordinances pursuant to a clearly articulated and affirmatively expressed state policy, and that, therefore, the City's conduct constituted protected municipal action under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985). Pet. App. 6a-9a. The court nonetheless held the City liable under a "co-conspirator" theory, on the ground that the jury could reasonably have found that the City acted "solely to further the anticompetitive commercial purposes of [COA]." Pet. App. 10a.[8]

Next, the court ruled that COA was not protected by the *Noerr* doctrine, because its actions fell within the "sham" exception. In support of this conclusion, the court stated that COA's lobbying " 'was actually nothing more than an attempt to interfere directly with the business relationships of a competitor' or an attempt to harass and deter Omni." Pet. App. 22a (quoting *Noerr*, 365 U.S. at 144). The court also drew the "inference[]" that COA had persuaded the City to enact and defend the initial moratorium ordinance, which was later held unconstitutional, despite the contrary advice of the City Attorney. *Id.* at 22a. Finally, the court characterized as merely "*pro forma*" Omni's appearances before city officials at public and private meetings to address proposed bill-

[8] In reaching this conclusion, the court reviewed the evidence and held that it supported the following: (1) COA's motive for seeking an ordinance was to prevent respondent from entering the market; (2) COA's owner was a life-long friend of the Mayor and enjoyed close friendships with all four members of the City Council; (3) COA executives met with the Mayor on several occasions to lobby for the ordinance; (4) the ordinance conformed to COA's position; and (5) COA had a practice of offering free or discounted billboard space to numerous state and local officials, including the Mayor and some Council members. Pet. App. 13a-18a.

board regulations. *Id.* at 23a. For these reasons, the court concluded that Omni had been denied "meaningful access" to the relevant governmental decisionmakers. *Id.* at 22a-23a.[9]

Judge Wilkins dissented. He first stated that the district court's conspiracy instructions were deficient because they permitted the jury to find liability solely on the basis of COA's personal relationships with city officials. *Id.* at 39a. He then went on to argue that, as a matter of law, the record did not justify withholding either *Parker* or *Noerr* protection: since there was not a "scintilla" of evidence of illegality or fraud in the process that led to the billboard ordinances, there was no reason to hold either the City or COA liable. *Id.* at 39a-48a.

The panel denied the City's and COA's petition for rehearing, and the full Fourth Circuit denied their suggestion for rehearing en banc by an evenly divided vote. *Id.* at 68a-69a.

[9] The Fourth Circuit also rejected petitioners' arguments that Omni had failed to prove both the relevant product market and antitrust injury, Pet. App. 24a-30a, and that the jury improperly calculated damages, *id.* at 32a-37a. Finally, the court reversed the district court's judgment notwithstanding the verdict on the state law unfair trade practices claim, holding that, while "[t]here are no South Carolina cases on the point, . . . in our view, a finding of conspiracy to restrain competition is tantamount to a finding that the underlying conduct has 'an impact upon the public interest.' " *Id.* at 31a. The court thus reinstated the $11,000 jury verdict for Omni on this claim and remanded to the district court to make findings on whether COA's "acts were willful or knowing," which would then warrant trebling the verdict. *Id.* Since the judgment on the state law claim depends solely on the Fourth Circuit's prior finding of federal antitrust liability, this Court should vacate and remand the state law claim if it reverses the antitrust judgment against COA. *See* Pet. App. 48a (Wilkins, J., dissenting).

SUMMARY OF ARGUMENT

The *Parker* and *Noerr* doctrines both rest on "policies of signal importance in our national traditions and governmental structure of federalism." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 400 (1978). In this case, however, respondent and the court of appeals, by invoking the term "conspiracy," seek to transform the intersection between these two fundamental doctrines into a justification for simultaneously undoing both. In our view, that approach is misguided. Each petitioner, for related as well as for separate reasons, is entitled to an exemption from the Sherman Act on the facts presented.

1. The City of Columbia is exempt because its ordinances were clearly adopted pursuant to state statutes that contemplate potential anticompetitive effects. *See Town of Hallie*, 471 U.S. at 47; *Parker*, 317 U.S. at 352. Contrary to the Fourth Circuit's view, there is no basis for carving out a "conspiracy" exception to the *Parker-Town of Hallie* doctrine. *See Hoover v. Ronwin*, 466 U.S. 558, 579-80 (1984). The antitrust laws are neither intended nor well suited to serve as a national code of ethics for policing the motives behind state or municipal regulation that is otherwise lawful.

If, contrary to our submission, there is to be a "conspiracy" exception, it should be limited to cases where city officials (or the city itself) are shown to have a direct economic interest in the governmental regulation in question—for example, through receipt of a bribe or through financial involvement in the business being regulated. *Cf. Allied Tube & Conduit Corp v. Indian Head, Inc.*, 486 U.S. 492, 510-11 (1988). The acceptance of lawful campaign contributions or other benefits that are a routine part of the political process, on the other hand, should not be a permissible basis for a conspiracy finding.

2. COA's activities are exempt from antitrust liability for two reasons. First, if the City's actions are protected by *Parker*, it follows automatically that COA cannot be held liable. "'[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability." *Allied Tube*, 486 U.S. at 499 (quoting *Noerr*, 365 U.S. at 136). *See also United Mine Workers v. Pennington*, 381 U.S. 657, 671-72 (1965).

Second, COA is independently protected by the First Amendment right to petition. That right extends to any use of lawful lobbying methods and applies to efforts to secure anticompetitive governmental action. *See Noerr*, 365 U.S. at 138-39. The Fourth Circuit's invocation of the "sham" exception to *Noerr* to support a contrary conclusion was doctrinally incorrect, *see Allied Tube*, 486 U.S. at 507 n.10, and grounded in specific considerations —such as COA's motive and the subsequent invalidation of the initial moratorium ordinance—that are plainly insufficient to overcome the right to petition.

ARGUMENT

I. THE CITY'S ACTIVITIES ARE EXEMPT FROM ANTITRUST LIABILITY UNDER THE *PARKER* DOCTRINE.

The Fourth Circuit held that the City's ordinances were clearly authorized by state zoning statutes and thus met the test set out in *Town of Hallie*. This holding was obviously correct and is sufficient, by itself, to provide antitrust immunity for the City under *Parker*. Moreover, even assuming that *Parker* immunity may sometimes be denied to a municipality that has acted within the scope of a clear legislative authorization, this is not such a case. The evidence presented reveals, at most, an unexceptional and purely lawful lobbying effort by COA and a positive response to that effort by local officials who had no financial interest in the outcome of the governmental action at issue.

A. A Municipality Cannot Be Held Liable for Enacting an Anticompetitive Ordinance that Is Legislatively Authorized.

1. Parker *and* Town of Hallie *Require an Exemption Here.* This Court in *Parker* held that the Sherman Act does not extend to restraints on trade "imposed . . . as an act of government" by a sovereign state. 317 U.S. at 352. The purpose of the antitrust laws is "to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations," *id.* at 351, not to "compromise the States' ability to regulate their domestic commerce," *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 56 (1985). This conclusion rests on the principle that, in our "dual system of government, . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351.

The Court has also made clear that state laws may render municipalities the "agents of the State under the *Parker* doctrine." *City of Lafayette*, 435 U.S. at 397. This approach "preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws." *Id.* at 415. The prevailing test for extending *Parker* protection to municipalities was established in *Town of Hallie*. Under that test, a municipality need show only that it was authorized to act pursuant to a "clearly articulated and affirmatively expressed" state policy that contemplates, at least implicitly, potentially anticompetitive effects. 471 U.S. at 44.[10]

[10] The legislature does not have to state explicitly that it intended anticompetitive effects, *Town of Hallie*, 471 U.S. at 43, compel the municipality to take the authorized action, *id.* at 45-46, or actively supervise the municipality in its regulatory activities, *id.* at 46-47.

The *Town of Hallie* test is clearly satisfied here, as the Fourth Circuit readily acknowledged. Pet. App. 7a-9a. South Carolina statutes grant municipalities plenary authority to regulate the use of land and the construction of buildings and other structures within their boundaries. S.C. Code Ann. §§ 5-23-10, 5-23-20 (Law Co-op. 1976) (excerpted at Pet. App. 7a n.2). Cities, in exercising this power, are authorized to act, *inter alia*, to "lessen congestion in the streets . . ., to promote . . . the general welfare, to provide adequate light and air[,] to prevent the overcrowding of land . . . [and] to protect scenic areas." *Id.* § 6-7-10 (excerpted at Pet. App. 7a n.2). *See also* Pet. App. 53a-54a. There can be no doubt that the South Carolina legislature included within this grant of municipal authority the power to restrict the use of billboards and, further, that it must have been aware that a billboard ordinance, much like zoning regulations in general, might restrict competition.[11]

The City's actions, having thus complied with the *Town of Hallie* requirements, cannot be found to violate the antitrust laws. This conclusion flows directly from two settled principles. First, when the *Town of Hallie* test is met, "the actions of a State's subdivisions *are* the actions of the State." *City of Lafayette*, 435 U.S. at 407 n.33 (emphasis supplied). Second, the antitrust laws reflect no "intent . . . to strike down the State's regulatory program imposed as an act of government."

[11] Any zoning ordinance limiting the creation or operation of a type of business obviously may restrict competition. A holding that the ordinances at issue here were not sufficiently authorized under *Town of Hallie* would thus call into question the validity of innumerable municipal ordinances around the country, enacted under similar general authorization statutes, that limit billboards or other business activities. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion) (referring to numerous state and municipal laws that limit billboards); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982) (noting long history of using zoning laws to restrict businesses near schools, churches and hospitals).

Id. Rather, a restraint resulting from such "valid governmental action" is protected because "under our form of government the question whether a law of that kind should pass . . . is the responsibility of the appropriate legislative . . . branch of government so long as the law itself does not violate some provision of the Constitution." *Noerr*, 365 U.S. at 136.

2. *There Is No Basis for a "Conspiracy" Exception to the* Parker-Town of Hallie *Doctrine.* The court of appeals sought to move beyond *Town of Hallie* by holding that a state-authorized municipal ordinance may become illegal if it is the product of a "conspiracy" between the municipality and a private business. This approach is illogical on its face. An "agreement" only becomes a "conspiracy" if it relates to some form of illegal conduct. Under *Parker*, however, a sovereign does nothing illegal by choosing to regulate the free market. It follows that an "agreement" between state or local officials and private parties concerning the passage of such regulatory legislation cannot constitute a "conspiracy." Nothing in the Fourth Circuit's analysis undermines this conclusion.

a. The Fourth Circuit began its discussion by quoting this Court's statement in *Parker* that "we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." 317 U.S. at 351-52 (citing *Union Pac. R.R. v. United States*, 313 U.S. 450 (1941)), *quoted at* Pet. App. 9a. The court of appeals application of this phrase, however, would effectively undo the whole *Parker* doctrine, since regulatory legislation can almost always be characterized as the product of an "agreement" between legislators and the favored private interests who lobbied for it.[12] Indeed, as Professors Areeda

[12] Congress can hardly have intended to exempt from the Sherman Act only those state actions undertaken without contact with private individuals who have a vested interest in the outcome. Thus, in *Hoover v. Ronwin*, 466 U.S. 558 (1984), the Court rejected the argument that a state's limits on bar admissions were the product of an undisclosed anticompetitive conspiracy on the part of members of a public bar admissions committee that advised the state supreme court. It held that it would "emasculate the *Parker v. Brown* doctrine" to premise liability on "perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign." *Id.* at 580. A rule denying *Parker* protections based on "perceived conspiracies" between public officials and affected private interests in the legislative process would have an even greater effect in undoing *Parker* protections, because virtually all legislation is supported by some private interests.

and Turner note, such a broad reading of the "private agreement" language in *Parker* would contradict the decision in that very case, which involved state regulation that authorized private price-setting and output limitations among producers and made these restraints enforceable under state law. 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 212c (1978).

The limited exception suggested in *Parker*, therefore, cannot properly be interpreted to reach circumstances where the state has "effectuated [a] clearly expressed purpose to substitute its own regulation for the action of the market." *Id.* That substitution will occur, at a minimum, whenever a state or a duly authorized municipality adopts a regulatory program that directly affects competition. *See Parker*, 317 U.S. at 352 ("The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, *as* [*a*] *sovereign, imposed the restraint as an act of government* . . . .") (emphasis supplied). Nor does the language in *Parker* relied on by the Fourth Circuit support a different view. It suggests, at most, this Court's intention not to exempt "*private* agreement[s] or combination[s] by others" merely because a state as operator of a business joins in the conspiracy. 317 U.S. at 352 (emphasis

supplied).[13] But that rationale has nothing at all to do with the very different considerations that are raised by the enactment of state or local regulatory laws.

b. Not only is the Fourth Circuit's reliance on *Parker* misplaced, but its reasons for applying a conspiracy exception to this case make no sense. The court never suggested that the record contained evidence of "any illegal conduct such as bribery, coercion, violence, kickbacks, or the like," or that "the Mayor [or] the City Council members stood to gain any personal financial advantage by passing the billboard ordinances." Pet. App. 39a (Wilkins, J., dissenting). Instead, the court deemed it sufficient that the jury could have found that the City passed the ordinances "solely to further the anticompetitive commercial purposes of [COA]." *Id.* at 10a (citation omitted). In other words, the City was held to be a co-conspirator here because its actions were not taken "for the public good." *Id.* at 5a.

Such an approach is both contradicted by this Court's decisions and indefensible in principle. In *Hoover v. Ronwin*, the Court held that "where the action complained of . . . was that of the State itself, the action is exempt from antitrust liability *regardless of the State's motives in taking the action.*" 466 U.S. at 579-80 (emphasis supplied) (citing *Parker* and *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-61 (1977)). "The only requirement is that the action be that of 'the State acting as a sovereign.'" *Id.* at 574 (quoting *Bates*, 433 U.S. at 360).

In other contexts as well, the Court has noted that inquiries into legislative motive "are a hazardous matter," *United States v. O'Brien*, 391 U.S. 367, 383 (1968), and constitute "a substantial intrusion into the workings of other branches of government," *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977).[14] Consequently, the Court generally has held that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383, *quoted in City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). The only recognized exceptions to this policy are the "very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose." *O'Brien*, 391 U.S. at 383 n.30 (citing bill of attainder cases); *see Village of Arlington Heights*, 429 U.S. at 264-68 (authorizing inquiry into alleged racial animus); *Edwards v. Aguillard*, 482 U.S. 578, 586-89 (1987) (discussing secular-purpose test under the Establishment Clause).

Nothing about the Sherman Act assessment of the scope of protected state action warrants its placement into this small group of special cases. Indeed, the sheer breadth of state and local legislation affecting private economic interests is reason enough to deny courts the authority to examine the subjective motives behind such laws whenever an affected party alleges an "agreement" between public and private entities. As then-Judge Kennedy explained, "if the state action exemption is to remain faithful to its foundations in federalism and state sovereignty" the exemption cannot depend on the "alleged bad faith motivations of [government officials]." *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985).

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[13] As noted, the Court accompanied this language with a cite to *Union Pac. R.R. v. United States*, 313 U.S. 450 (1941), a case that involved illegal rebates offered by a railroad as part of a conspiracy to divert business to a city-owned railroad terminal. As Areeda and Turner explain, "this indicates that a private price-fixing conspiracy among rival producers is not immunized because one of the producers is state owned." 1 P. Areeda & D. Turner, *supra* ¶ 212c.

[14] In *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982), for example, the Court stressed the "substantial costs" associated with inquiries into the subjective good faith of government officials. Since discretionary decisions "almost inevitably are influenced by the decisionmaker's experiences, values, and emotions," such issues "rarely can be decided by summary judgment" and may lead to "broad-ranging discovery." *Id.* at 816-17.

Nor is there any justification for distinguishing municipalities from state governments in this regard, as the Fourth Circuit appeared to suggest. Pet. App. 12a.[15] The nature of the intrusion into governmental processes and the practical difficulty in making the inquiry are the same in both circumstances. *See Boone v. Redevelopment Agency*, 841 F.2d 886, 892 (9th Cir.), *cert. denied*, 488 U.S. 965 (1988); *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 234 (3d Cir. 1987). *See also Town of Hallie*, 471 U.S. at 45-47 (rejecting argument that municipalities will use delegated authority to harm competition unduly unless subjected to "state compulsion" and "active state supervision" requirements).[16]

c. In its opposition to the petition for certiorari, respondent took the position that the judgment against the City should be upheld because this case involves a *corrupt* agreement to trade favorable legislation for campaign contributions.[17] This belated claim, aside from contra-

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[15] To the extent the court relied on the language in *Parker* excepting public participation in a "private agreement or combination by others for restraint of trade," 317 U.S. at 351-52 (*see* Pet. App. 9a-10a; *supra* pp. 14-15, that language cannot support a state/municipal distinction since it applies equally to a "state or its municipality." 317 U.S. at 351.

[16] The Court in *Town of Hallie* also rejected the argument that a state legislature must "expressly state . . . that the legislature intends for the delegated action to have anticompetitive effects." 471 U.S. at 43. It reasoned that "such a close examination of a state legislature's intent" would "embroil the federal courts in the unnecessary interpretation of state statutes" and "undercut the fundamental policy of *Parker*." *Id.* at 44 n.7. By the same token, Congress can hardly have intended courts to "embroil" themselves in determining the motives of municipal legislators in taking otherwise valid actions.

[17] *See* Br. in Opp. to Cert. at 3 ("The officials who ran the government of the City and the officers owning and running . . . COA had a secret, illegal and continuous agreement to utilize mutual resources, including perverted governmental powers, to benefit each other both financially and politically by excluding COA's competitors

dicting respondent's own position before the jury, *see supra* n.5, is not supported by the record, *see supra* p. 6. It also departs from the reasoning of the court of appeals. *See* Pet. App. 22a-23a; *see also* Pet. App. 43a-44a (Wilkins, J., dissenting) ("no evidence of illegal conduct, . . . [or] selfish or otherwise corrupt motive").[18] In any event, there is no basis for creating a "corruption" exception to *Parker*.

As early as *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), the Court recognized the principle that the validity of state legislation should not turn on a court's inquiry into possible corruption of the legislative process. In so doing, the Court noted the difficult determinations that such an inquiry would require—including (1) what type of corruption to target,[19] (2) what number of legislators must be affected,[20] and (3) what action to take if "public sentiment" in fact supports the law at issue.[21] These questions would be equally vexing, of course, if political corruption became a relevant factor in applying the *Parker* doctrine to otherwise valid laws. *See* 1 P. Areeda & D. Turner, *supra*, ¶ 204d.

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and by providing unfair advertising advantages to incumbent Councilmen making them more difficult to defeat."); *id.* at 19 ("The issue of 'subjective motivations' which the Petitioners attempt to raise simply does not exist in the context of this case.").

[18] The majority opinion mentioned, without any particular emphasis, the evidence of *legal* campaign contributions made by COA to some of the officials who voted for the ordinances. Pet. App. 16a-17a. It saw this evidence as just one part of Omni's proof of an agreement between COA and the City.

[19] *Fletcher*, 10 U.S. at 130 ("Must it be direct corruption, or would interest or undue influence of any kind be sufficient?").

[20] *Id.* ("Must the vitiating cause operate on a majority, or on what number of the members?").

[21] *Id.* ("Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?").

In view of this well-entrenched reluctance to invalidate government action on the basis of political corruption, it seems extremely unlikely that Congress intended to achieve precisely that goal through enforcement of the antitrust laws. Certainly, there is nothing in the language of those statutes or their legislative history suggesting that Congress wanted to invalidate "corrupt" restraints while exempting precisely the same restraints when they are not based on corrupt motives. Such a far-reaching and novel national policy to invalidate state and local laws on the basis of corruption in the process through which they were adopted should not be created out of congressional silence. *See McNally v. United States*, 483 U.S. 350, 359-61 & n.9 (1987).

Purely as a matter of policy, moreover, there is no need for the Court to read a "corruption" exception into the antitrust laws. Where corrupt governmental conduct is illegal under another law, that law should provide "an entirely adequate remedy." Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 53 Fordham L. Rev. 23, 66 (1984). And to the extent that the "corruption" alleged is not otherwise illegal, it would be especially inappropriate for the federal courts to begin "to promulgate standards for political behavior" under the guise of enforcing the antitrust laws. 1 P. Areeda & D. Turner, *supra*, ¶ 204a.

B. Any Exception to the *Parker* Exemption for State-Authorized Municipal Action Cannot Sensibly Extend to this Case.

If the Court were inclined to recognize some new exception to *Parker* as it applies to state-authorized municipal legislation, the concerns just discussed would plainly require that such an exception be clearly and narrowly defined. In our view, the only rule that is even arguably defensible would require a showing of objective facts, such as bribes or personal financial interests, demonstrating unmistakably that the relevant officials abused their public trust. *Cf. Allied Tube*, 486 U.S. at 509 (*Noerr* does not apply when "an economically interested [private] party exercises decision-making authority in formulating a product standard"). By contrast, an exception allowing juries to determine whether a city's actions were taken "for the public good," Pet. App. 5a, would effectively deter municipalities from adopting any potentially anti-competitive regulations.

The facts of the instant case illustrate the force of this position. Billboard regulations like those adopted by the City of Columbia are widespread throughout the country, for good and obvious public reasons. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. at 507-08 ("Nor can there be substantial doubt that the twin goals that the [billboard] ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals."). Indeed, specific evidence in this case indicates that, in passing the ordinances, the relevant city officials were reacting to longstanding concerns about the proliferation of billboards while also responding directly to requests from local citizens who shared those concerns. It is undisputed that the entry of Omni into the market had led to the construction of many new billboards by both Omni and COA. The initial moratorium ordinance, although held unconstitutional, simply attempted to maintain the status quo while the City could study the problem. The City immediately requested the appropriate regional planning authority to conduct a comprehensive analysis, which included extensive public participation, as a basis for developing the final, constitutionally valid ordinance.

Omni's proof of a "conspiracy" rested on evidence that COA's executives, who were friendly with local officials, sought a billboard ordinance to counter Omni's entry into the market and that they once told another potential competitor that the Mayor would be willing to support

such an ordinance at their request. Omni also showed that COA made lawful campaign contributions to some of the officials who voted for the ordinance. But there was no evidence linking those contributions to the City's actions; on the contrary, the contributions occurred either years before Omni appeared on the scene or after this lawsuit was filed.

We summarize this evidence not to suggest that it necessarily rules out the conclusion that the City acted pursuant to a desire to favor COA, pure and simple. Rather, this evidence demonstrates the problems inherent in any effort to inquire into governmental motive in the first place. Where, as here, a municipality considers regulating the market in a manner authorized by the state, the proposed regulation will generally be supported by legitimate public concerns. There may also be private entities who stand to gain a competitive advantage from the regulation and who will exercise their rights under the First Amendment to lobby for it. But such lobbying efforts should hardly become a basis for exposing the government to the risk of antitrust liability and thereby deterring it from actions it would otherwise have favored. In fact, private interests may provide needed information to the government and may also help to mobilize sufficient political support for an otherwise desirable measure. *See Noerr*, 365 U.S. at 137, 139.[22]

These concerns would be significantly diminished if plaintiffs alleging an antitrust "conspiracy" as a basis for invalidating an otherwise proper municipal ordinance

[22] There could be no more opportune time for a city to pass anti-billboard ordinances than when the largest local billboard company is supporting such ordinances. As this Court noted in *Noerr*, restricting self-interested lobbying "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." 365 U.S. at 137. After all, "it is quite probably people with . . . a hope of personal advantage who provide much of the information upon which governments must act." *Id.* at 139.

were required to demonstrate that the controlling decisionmakers either were bribed or had a personal financial interest in the matter brought before them. As we have noted, it is doubtful that the antitrust laws are a proper vehicle for cleansing the political process of these improprieties. *See supra* pp. 19-20. Nevertheless, in circumstances demonstrating such direct corruption, it can at least be said that there are concrete, objective facts to establish a deviation from the legislators' presumed attention to the public interest. A city is unlikely to be deterred from exercising its authority to regulate commerce by a requirement that it act through officials who are neither "bought" nor part of the group that stands to gain financially from the anticompetitive effects of the regulation at issue.

It bears repeating, however, that no such facts were proved below or assumed by the court of appeals. Thus, even if the Court were inclined to consider a new "corruption" exception, this case would provide a poor vehicle for doing so. It involves nothing more than garden-variety municipal legislation that benefited parties who supported the government's action. If *Parker* and *Town of Hallie* are to retain any real vitality, therefore, the City must be protected here. As the United States stated in similar circumstances, "if ordinary politics is not to be the basis for antitrust liability, then politicians who engage in it cannot become coconspirators by reaching accommodations with those who petition them." Brief for the United States as Amicus Curiae in No. 84-951, *Gulf Coast Cable Television Co. v. Affiliated Capital Corp.* at 11 (filed December 2, 1985).[23]

[23] If the Court were to disagree with our argument that it should hold for the City as a matter of law, we think a new trial would then be necessary. The judgment below cannot be affirmed under any reasonably well-defined "conspiracy" exception, because nothing in the jury instructions remotely required such a finding. *See supra* pp. 6-7.

II. COA'S LOBBYING ACTIVITIES ARE EXEMPT FROM ANTITRUST LIABILITY UNDER THE *NOERR* DOCTRINE.

The judgment against petitioner COA must be reversed for two reasons. First, if the City's ordinance is protected under *Parker*, COA cannot be held liable for activity having sought or supported that ordinance. Second, even if the ordinance were not protected by *Parker*, COA's lobbying activities would be independently protected under the First Amendment. The Petition Clause of that Amendment extends to lawful lobbying methods that are used in an "attempt to persuade the legislature . . . to take a particular action with respect to a law that would produce a restraint or monopoly." *Noerr*, 365 U.S. at 136.

A. COA Cannot Be Held Liable for Seeking or Supporting an Ordinance Protected by *Parker*.

If we are correct that the City's actions are exempt under *Parker*, then COA is likewise exempt for having sought or supported those actions. The Court has previously made clear that, " 'where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability." *Allied Tube*, 486 U.S. at 499 (quoting *Noerr*, 365 U.S. at 136). *See also Pennington*, 381 U.S. at 671-72; *Hoover*, 466 U.S. at 597 n.23 (Stevens, J., dissenting).[24]

This straightforward conclusion rests on well-established congressional intent. As the Court explained

[24] Omni's attempt to rely on conduct of COA other than that directly related to petitioning for the ordinances, see Br. in Opp. to Cert. at 5 (citing "double billing" and "artificially low rates"), is inconsistent with the record and thus, not surprisingly, with the way in which all of the judges in the courts below understood the case. *See* Pet. App. 33a ("[i]n the present case, Omni claims that its losses were caused by the ordinances"); Pet. App. 4a.

in *Noerr*: "To hold that the government retains the power to act in [a] representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." 365 U.S. at 137 (footnote discussing *Parker* omitted). Moreover, sanctioning private parties when the law in question is authorized under *Parker* would be irrational and unfair. Such an approach imposes treble damages on a private party for the continuing effects of a valid law that only the government is empowered to repeal. *See* 1 P. Areeda & D. Turner, *supra*, ¶ 204d.

Nor would it matter in these circumstances if, contrary to the evidence, *see supra* p. 6, COA had used lobbying methods that were outside the scope of its First Amendment right to petition. *Noerr* made this clear as well. Thus, although the Court recognized that the lobbying and public relations effort in that case "deliberately deceived the public and public officials[,] . . . that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." 365 U.S. at 145. To the contrary, a " 'no-hold-barred fight' between two industries both of which are seeking control of a profitable source of income" is "commonplace in the halls of legislative bodies," *id.* at 144 (footnotes omitted); and the antitrust laws do not provide a second forum for continuing such a fight after the legislature has spoken. In short, given the "unethical" conduct that was exempted from antitrust scrutiny in *Noerr*, 365 U.S. at 140, COA's legitimate lobbying activities must plainly be protected if the City's actions are protected under *Parker*.

B. Regardless of the City's Exemption Under *Parker*, COA's Lobbying Activities Are Protected by the First Amendment Right to Petition.

Although COA must be exonerated if the City is, COA's claim to immunity does not depend only on the validity of the City's actions. Even if those actions are not covered by *Parker*, COA is still protected—not as a matter of statutory construction as just discussed, but because of the First Amendment. *See Noerr*, 365 U.S. at 138. Neither the Fourth Circuit's invocation of the "sham" exception to *Noerr*, nor the specific factors that the court relied on, detract from this conclusion.

1. *The First Amendment Protects COA's Activties.* The First Amendment expressly guarantees the people's right to "petition the Government for a redress of grievances." That right, for reasons too obvious to belabor, is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). Indeed, the right has long been recognized as "implicit in '[t]he very idea of government, republican in form.'" *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)). This fundamental right covers COA's activities in this case. Neither the means used by COA nor the ends it pursued run afoul of the First Amendment.

To begin with, COA's methods were all lawful, well-recognized lobbying techniques, traditionally used in legislative battles. Thus, COA's principals were charged with being friends with the Mayor, meeting with city officials at opportune times, and making campaign contributions. None of these activities was barred by any other law. Indeed, each is independently protected by the other clauses of the First Amendment. *See, e.g., Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1396 (1990) ("the use of funds to support a political candidate is . . . 'political expression at the core of our electoral

process and of the First Amendment freedoms'") (internal quotations omitted) (citations omitted); *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (right to associate with governmental officials). Such activities do not lose their constitutional protection when they are employed in a successful petitioning effort. On the contrary, "[i]t was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . ." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Much like the means, there is nothing about the ends pursued by COA that could justify taking away its constitutional protection. Even assuming the governmental actions it sought turned out not to be protected by *Parker*, that would provide no basis to penalize COA. Mere advocacy of illegal conduct remains protected under the First Amendment unless it constitutes "incitement to imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam). Nothing here satisfies that demanding standard. Moreover, any rule tying the liability of those who petition government to the ultimate validity of a statute they support would unduly chill the exercise of First Amendment rights. *In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568, 584-85 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982). *See generally New York Times v. Sullivan*, 376 U.S. 254, 269-72 (1964).

2. *The Fourth Circuit's Reliance on the Sham Exception to* Noerr *Was Misplaced.* Despite the fact that COA's lobby activities were indisputably genuine, the court of appeals held that they fall wthin the "sham" exception to *Noerr*. To support this conclusion, the court relied on three considerations: first, that COA's actions were intended to harm Omni; second, that the initial moratorium ordinance turned out to be unconstitutional; and third,

that Omni's position appeared to be given only "*pro forma*" consideration by city officials. This whole analysis is flawed.

As an initial matter, this Court has recently made clear that the sham exception applies only where petitioning is not genuinely aimed at securing governmental action, but is itself used as a way to inflict direct injury on a competitor. In *Allied Tube & Conduit Corp. v. Indian Head Inc.*, the Court expressly repudiated a Ninth Circuit rule that had extended the sham exception to "the activity of a defendant who 'genuinely seeks to achieve his governmental result, but does so *through improper means*.'" 486 U.S. at 507 n.10 (emphasis in original) (quoting *Sessions Tank Liners, Inc. v. Joor Mfg.*, 827 F.2d 458, 465 n.5 (9th Cir. 1987)). "Such a use of the word 'sham' distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action." *Id.* In this case, it is undisputed that COA's petitioning activities were genuinely aimed at securing governmental action. Thus, they cannot be deemed a "sham."

More significantly, the actual factors relied on by the Fourth Circuit to hold COA liable simply do not justify any exception to *Noerr*. The first factor was that COA

> had operated in the Columbia market for some forty years under existing ordinances and had not sought substantial changes until it was threatened with competition. The changes it sought obviously inured to COA's position in its contest with the incoming competition. Construed from that perspective, the facts support a jury conclusion that COA's interaction with the mayor, City administrators, and members of the Council 'was actually nothing more than an attempt to interfere directly with the business relations of a competitor' or an attempt to harass and deter Omni.

Pet. App. 22a (quoting *Noerr*, 365 U.S. at 144). This reasoning, however, reflects a serious misunderstanding

of *Noerr*. "If *Noerr* teaches anything it is that an intent to restrain trade as a *result* of government action sought . . . does not foreclose protection." Sullivan, *Developments in the Noerr Doctrine*, 56 Antitrust L.J. 361, 362 (1987) (emphasis in original). *See also United Mine Workers v. Pennington*, 381 U.S. at 670 ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.").

The second factor pointed to by the Fourth Circuit was that "COA instigated the Council's enactment of an unconstitutional ordinance," the purpose of which was "to delay Omni's entry into the market." Pet. App. 22a.[25] For the reasons discussed above, however, First Amendment protections do not disappear because a speaker urges unlawful legislative action. *See supra* p. 27. In any event, it would impose far too great a burden on the exercise of a citizen's petitioning rights if he or she could be found liable whenever a law is subsequently held unconstitutional. *See, e.g., Subscription Television, Inc. v. Southern California Theatre Owners Ass'n*, 576 F.2d 230, 233-34 (9th Cir. 1978); P. Areeda & H. Hovenkamp, *supra*, ¶ 203.2a (1989 Supp.).[26]

Finally, the Fourth Circuit stated that, although "Omni representatives met with City zoning officials and appeared before Council, the jury could well have be-

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[25] There was, in fact, no evidence presented suggesting that COA had anything to do with the decision to include in the initial ordinance the provision contemplating case-by-case Council approval of billboards, which was later held unconstitutional.

[26] Even if COA's involvement in the initial moratorium were found to be outside the protection of *Noerr* on the ground that the ordinance was unconstitutional, COA's support of the second, *permanent* ordinance certainly would be exempt from antitrust liability since the validity of that ordinance has never even been challenged. The later ordinance caused a substantial part of the injury alleged by Omni, C.A. App. 1235-43, and thus the verdict cannot be supported on the basis of the first ordinance alone.

lieved that this was not truly meaningful access but merely a *pro forma* recognition of proponent views." Pet. App. 23a. To support this view, the court cited *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972), in which this Court had stated that an effort to "harass and deter respondents in their use of administrative and judicial proceedings" might have some bearing on allegations of a sham. Unlike that case, however, there is no indication here that COA interfered with Omni's access to government officials. On the contrary, the record is clear that Omni met with the CMRPC officials and City Council members on numerous occasions. *See supra* p. 4 & n.4.

Moreover, even assuming that one could infer that Omni's meetings with city officials were "*pro forma*" in light of the City's final action, Pet. App. 23a, that quality is inherent in the nature of the legislative and executive processes. As Justice Holmes explained, "[g]eneral statutes within the state power are passed that affect the persons or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). In that fundamental respect as well, therefore, this case differs from the judicial and administrative access issues to which this Court alluded in *California Motor Transport*. While entirely different "due process" standards may appropriately apply to adjudicative proceedings, the refusal by city officials "to listen to or respond to" Omni's concerns provides no basis for imposing liability on COA. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984); *see California Motor Transport*, 404 U.S. at 513-14 (distinguishing legislative and executive processes from judicial and administrative processes).

In sum, nothing in the Fourth Circuit's analysis undermines the conclusion that COA's lobbying activities were fully protected by the First Amendment. Under no view, therefore, can those activities be made the basis for an antitrust violation.[27]

CONCLUSION

The judgment of the court of appeals should be reversed as to both petitioners.

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[27] Although we think it is clear that judgment must be entered for COA, at a minimum a new trial is necessary. For the reasons already discussed, the jury instructions on *Noerr*, *see supra* pp. 6-7, to which COA and the City objected, J.A. 109-12, were woefully inadequate.